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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY MAURICE COBB,

Defendant and Appellant.

C061185

(Super. Ct. Nos.
LF007051A, MF031641A)

In June 2006, in case No. LF007051A, defendant Anthony Maurice Cobb pleaded guilty to second degree commercial burglary (Pen. Code, §§ 459, 460, subd. (b))¹, failure to appear on a felony charge (§ 1320, subd. (b)), and resisting or delaying a peace officer (§ 148, subd. (a)(1)). Imposition of sentence was suspended and defendant was placed on probation for five years on conditions including service of 120 days in the county jail; along with payment of restitution to the victim, a \$341 fine, a

¹ Further undesignated statutory references are to the Penal Code.

\$200 restitution fine (\$ 1202.4, subd. (b)), a \$200 restitution fine suspended unless probation is revoked (\$ 1202.44), and a \$20 court security fee (\$ 1465.8). In July 2007, the restitution fine and fees were waived because defendant was being supervised by an out-of-state agency.

In December 2008, in case No. MF031641A, a jury convicted defendant of second degree robbery. (§§ 211, 212.5, subd. (c).) Based upon the jury verdict, the trial court found that defendant had violated his probation in case No. LF007051A.

Defendant was sentenced to state prison for five years, consisting of the five-year upper term for the robbery and concurrent terms of two years each for the burglary and the failure to appear. In case No. MF031641A, he was awarded 153 days' custody credit and 22 days' conduct credit; in case No. LF007051A, he was awarded 252 days' custody credit and 126 days' conduct credit.

In case No. MF031641A, defendant was ordered to pay a \$200 restitution fine with a 10 percent surcharge, a \$200 restitution fine suspended unless parole is revoked, and a \$20 court security fee. No fines or fees were orally pronounced in case No. LF007051A.

FACTS

Case No. LF007051A

In June 2003, defendant entered a video store, stuffed some videos down his pants, and left the store.² He later struggled with an apprehending police officer. Following advisement of his constitutional rights, he admitted that he entered the store with the intent to commit theft. At an initial hearing, he was ordered to appear in court in July 2003, but he failed to do so.

Case No. MF031641A

At 12:30 a.m. on a morning in August 2008, a white pickup truck approached victim Johnny Herrera who was riding his bicycle. The truck stopped, and two Black males got out and approached Herrera. One of them was wearing a black shirt with a graphic on it. That man grabbed Herrera's backpack, pulled him off of his bicycle, and held onto his shoulders. The other man, who was later identified as Bruce Love, punched Herrera once in the face, knocking out his tooth. The man in the black shirt told Love, "Don't punch him," and Herrera was not punched again. Love then took Herrera's cellular telephone and iPod from his pockets. The duo took Herrera's backpack but Herrera asked to have it back and it was returned to him. Next, the duo tried to pick up Herrera's bicycle but they did not take it.

² Because the 2003 charges were resolved by plea, our statement of facts is taken from the prosecutor's statement of factual basis and the probation report.

The duo reentered the truck on the passenger side and drove away.

Herrera rode his bicycle to a convenience store and contacted the police. Officer Bryon Elness arrived within minutes and broadcast a description of two Black males in a white pickup truck. Officer William Mueller heard the broadcast. At a different convenience store only minutes away, he observed a white pickup truck and two Black males standing at the passenger side. Mueller continued to the victim's location, obtained a more complete description of the suspects, and returned to the store where the truck was located. Defendant was standing in front of the truck near the entrance of the convenience store. Love took off running and was subdued when threatened by a taser. Love had a minor injury on a knuckle on his right hand. Defendant approached Officer Mueller, asked him what was the problem, and eventually complied with Mueller's orders.

Herrera's iPod was found underneath a car that was parked next to the white truck.

Officer Elness brought Herrera to the store where defendant was detained. Herrera recognized the black shirt with the graphic on it that defendant was wearing and the white truck next to which he was standing. The shirt was the same one worn by the man who had not struck Herrera. Herrera was taken to another location where he identified Love as the man who had punched him.

At trial, Herrera was asked whether he saw in the courtroom the man who had not punched him but had tried to take his backpack. Herrera said, "No." Herrera then testified that he recognized defendant, who was seated at the counsel table, as the man who had punched him.

Herrera testified that the man who had hit him had tattoos on his face. In contrast, the man Herrera later observed standing next to the truck had no tattoos on his face. When shown photographs of tattoos on defendant's forearms, Herrera testified that he did not see them on the man who had attacked him. It was undisputed that defendant has tattoos and that Love does not.

In summation, the prosecution argued that Herrera got "the I.D. backwards in court."

DISCUSSION

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief.

Defendant filed a supplemental brief contending the trial court abused its discretion by failing to state reasons for its selection of the upper term of imprisonment. The point has no merit.

The trial court stated: "As far as the appropriate sentence, it is a two, three, five triad. His first felonies were in 1999 in Texas, two counts of burglary. He then -- it looks like he went to prison in Texas for a bail jumping failure to appear fairly recently, but his next significant felony was 2003, burglary in Lodi for which he is still on probation, as I stated. [¶] Also, he has five misdemeanor thefts. This was a robbery involving violence. The victim was outnumbered two to one. And I think under all the circumstances, especially in light of his prior record, that the appropriate term is the upper term." Defendant has not identified any defect in the foregoing statement of reasons. There was no error.

Defendant contends his trial counsel rendered ineffective assistance by (1) failing to challenge Herrera's identification of him prior to trial by subpoenaing witnesses "supporting [his] whereabouts," and (2) failing to challenge the jury verdict in the trial court based on the insufficiency of the eyewitness identification evidence. Neither point has merit.

"'[If] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding. [Citations.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Defendant's supplemental brief does not identify the witnesses who assertedly could have "supported" his version of his "whereabout[s]." Defense counsel was not asked why he had failed to subpoena those witnesses, and this is not a case in which there simply could be no satisfactory explanation.

(*People v. Mendoza Tello*, *supra*, 15 Cal.4th at pp. 266-267.)

Defense counsel could have decided not to challenge the sufficiency of the evidence in the trial court because such a challenge likely would have proved futile. (*People v. Stratton* (1988) 205 Cal.App.3d 87, 97.) The evidence fairly supported the prosecutor's argument in summation that Herrera simply got "the I.D. backwards in court."

Our review discloses some minor errors with respect to fines and fees. In 2007, in case No. LF007051A, the trial court waived the previously ordered "Restitution Fine and/or fees," because defendant was being supervised in an out-of-state jurisdiction. Thus at sentencing, the trial court did not orally impose any restitution fines or fees. However, the clerk's minutes of the sentencing hearing erroneously reflect a \$200 restitution fine, a \$20 administrative surcharge, a \$200 parole revocation fine, and a \$20 court security fee, none of which had been orally pronounced. All but the last fee are also listed in parts 9 and 11 of the abstract of judgment.

Having undertaken an examination of the entire record, we find no other arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is affirmed. The trial court is directed to correct its minutes and the abstract of judgment to omit any unimposed fines and fees. The court shall forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

_____, Acting P. J.

We concur:

_____, J.

_____, J.